

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

October 25, 2004

**DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS**

Appeal

Name of Case: **Worker Appeal**

Case Number: **TIA-0124**

Date of Filing: **June 29, 2004**

XXXXXX (the worker) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The worker was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that some of the worker's illnesses were not related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the worker filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be denied in part and granted in part, and the matter remanded to OWA for review of one portion of the claim that was not considered when the Panel made its initial determination.

I. Background

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) provides various forms of assistance or relief to workers currently or formerly employed by the nation's atomic weapons programs. See 42 U.S.C. §§ 7384, 7385. This case concerns Part D of the Act, which provides for a program to assist DOE contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. Part D establishes a DOE process through which independent physician panels consider whether exposure to toxic substances at DOE facilities caused, aggravated or contributed to employee illnesses. The DOE has issued regulations to implement Part D of the Act, hereinafter referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The DOE's program implementing Part D is administered by OWA.

Generally, if a physician panel issues a determination favorable to the employee, OWA accepts the determination and instructs the contractor not to oppose the claim unless required by law to do so. For those applicants who receive an unfavorable determination, the Physician Panel Rule provides an appeal process. Under this process,

an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain OWA decisions. 10 C.F.R. § 852.18. The present appeal seeks review of a negative determination by a Physician Panel that was accepted by OWA. 10 C.F.R. §852.18(a)(2). 10 C.F.R. § 852.18(c) states that an appeal is governed by the OHA procedural regulations set forth at 10 C.F.R. Part 1003. The applicable standard of review is set forth at 10 C.F.R. § 1003.36(c), which provides that "OHA may deny any appeal if the appellant does not establish that – (1) the appeal was filed by a person aggrieved by a DOE action; (2) the DOE's action was erroneous in fact or law; or (3) the DOE's action was arbitrary or capricious." 10 C.F.R. § 1003.36(c).

B. Factual Background

The worker was employed by DOE contractors at the gaseous diffusion plant in Portsmouth, Ohio from May 1, 1981 through May 14, 1982. Record at 7. The applicant submitted a claim to the OWA. As part of the application process, the applicant completed OWA Form entitled "Claim for Benefits under Energy Employees Occupational Illness Compensation Program Act." Question 8 of the form asks "Identify Diagnosed Conditions Being Claimed." Record at 3. The applicant responded: "chemical inhalation hydrogen fluoride (HF) chemical pharyngitis, industrial related post traumatic injury related psychiatric disability, chemical inhalation HF occupational chemical obstructive bronchial asthma plus reactive airway dysfunction syndrome." *Id.* at 3.

The OWA reviewed and prepared the case file and then forwarded it to the Physician Panel. The cover sheet to the case file identified three claimed illnesses: "chemical pharyngitis, occupational bronchial asthma, chronic bronchitis." The Physician Panel reviewed the case file and issued a report in which it made a positive determination for chemical pharyngitis, and a negative determination for occupational bronchial asthma and chronic bronchitis.¹ However, the Panel's report mistakenly listed Paducah rather than Portsmouth as the gaseous diffusion plant where the worker was employed, and the OWA's cover letter directed him to apply for workers' compensation benefits from the State of Kentucky, instead of Ohio. As discussed below, the Panel apparently did not consider the worker's claim for "industrial related post traumatic injury related psychiatric disability."

With respect to the worker's claims that exposure to HF and other toxic substances at the gaseous diffusion plant caused, aggravated or contributed to his bronchial asthma and chronic bronchitis, the Panel noted that the worker had inhaled HF gas in the incident on October 13, 1981. The Panel first considered the worker's bronchial asthma claim, reviewed his medical records, and noted that he had a normal chest x-ray in the year following the HF exposure. The Panel also cited a letter reporting on an examination a few months after the HF exposure which found

¹ Since the Panel made a favorable determination regarding a link between the worker's exposure to hydrogen fluoride and his chemical pharyngitis, the present appeal does not challenge that portion of the report.

The breathing tests did show a significant abnormality of a mild nature. This abnormality essentially showed an increase in the reactivity of the trachea and bronchi when measured by the breathing test...This breathing obstruction did however, revert to normal when you [the worker] were given a medicine to dilate your breathing tubes...work relatedness of which I believe is unknown at this time...I believe that the effects you likely suffered as a result of the incident involving hydrogen fluoride gas or fume, are resolvable and will likely not cause you any serious long term harm.

A follow-up pulmonary consultative report in 1998 stated

I do not believe [the worker's] symptomatic dyspnea (abnormal or uncomfortable breathing) relating to his inability to work, was related to his brief occupational exposure 16 years earlier. I feel this history, examination and PFTs (pulmonary function tests) are more consistent with dyspnea on the basis of COPD (chronic obstructive lung disease) related to his long-term smoking history.

Based on these and other, similar findings in the worker's medical history, the Panel concluded that

There is insufficient medical evidence provided that links a relationship to this diagnosis to exposure(s) at the workplace. Post-incident exposure testing was negative; there was no lost time from work. There no obvious need for evaluation for hospitalization following this incident. There are not reports of asthmatic type reactions occurring either before or after initial exposure to this or any other substance at the workplace.

* * *

The history of cigarette smoking alone is sufficient cause to lead to this diagnosis which is a component condition (asthma) of the diagnosis of COPD (chronic obstructive lung disease).

Determination at 1-4.

The Panel relied on the same evidence to make a negative determination on the worker's claim that exposures to HF and other toxic substances were linked to his chronic bronchitis. On June 9, 2004, the applicant appealed that determination.

II. Analysis

Under Part 852, "[w]hether a positive or favorable determination is rendered is to be based solely on the standard set forth [at 10 C.F.R.] § 852.8." 67 Fed. Reg. 52850 (August 14, 2002). That regulation states:

A Physician Panel must determine whether the illness or death arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility on the basis of whether it is as least as likely as not that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the illness or death of the worker at issue.

10 C.F.R. § 852.8. The preamble to Part 852 states “[t]he DOE intends that, as used in this context, the word ‘significant’ should have its normal dictionary definition and meaning –that is, ‘meaningful’ and/or ‘important’.” 67 Fed. Reg. 52847 (August 14, 2002).

The record supports the Physician Panel’s finding that the worker has not shown he had any exposure to a toxic substance while working at the Portsmouth plant that was a significant factor in aggravating, contributing to or causing his bronchial asthma, or his chronic bronchitis. In connection with his appeal, the worker states that he was placed on work restriction after his HF exposure on October 13, 1981, and remained on restricted status lasted until he resigned in May 1982. He also believes that he experienced other symptoms, including a “low iron count, upper W.B.C. (white blood count), elevated Fluoride reading 10/14/81 – 10/16/81 (immediately after his HF exposure), elevated Alpha reading, 2/25/82,” and swelling across his nose, eyelids, neck and pharynx. According to the worker’s appeal, his “records also show many missed work days and also many days sent home by Med. Dept. to return to Med. Dept. days later.”

The record notes that the worker inhaled HF on October 13, 1981, and was possibly exposed to other toxic substances. However, there is no evidence that any work-related exposures caused his bronchial asthma, or his chronic bronchitis. As the Panel observed, these conditions are commonly caused by cigarette smoking, and the worker has been a chronic smoker since the age of 19. Accordingly, the Panel’s finding under 10 C.F.R. § 852.8 that there is no link established between the worker’s exposure at Portsmouth and two of his three claimed medical problems--bronchial asthma and chronic bronchitis--is neither erroneous nor arbitrary or capricious.

On appeal, the worker also asserts that the Panel’s report failed altogether to consider whether the HF exposure incident on October 13, 1981 caused, aggravated or contributed to his third claimed medical problem, post traumatic injury related psychiatric disability. The worker is correct. The record confirms that he claimed this illness on the form he submitted to OWA. There is ample evidence in the record that a series of different psychiatrists and psychologists, who evaluated the worker in the context of his ongoing disability claims before the Ohio Bureau of Worker’s Compensation, found a connection between his HF exposure and subsequent post traumatic psychiatric disability related to the worker’s chemical pharyngitis. Beginning in 1989, the Ohio State agency allowed the worker’s claim for “chemical inhalation of hydrogen fluoride, chemical pharyngitis; post traumatic injury related psychiatric disability,” based on these evaluations. Record at 504. The worker is now considered by the Ohio agency to be 90 percent disabled.

There is no explanation why the Panel failed to consider or even mention this extensively documented medical problem, which a number of experts found to be linked to the worker's HF exposure in October 1981. Accordingly, I find that the matter should be remanded to OWA to consider this aspect of the worker's claim.

Finally, the worker points out that the Panel mistakenly stated that he worked in the Paducah gaseous diffusion plant, when he actually worked in the Portsmouth plant, and thus misdirected him to apply for workmen's compensation benefits in Kentucky, rather than Ohio. The record confirms that the worker was employed in Portsmouth, not Paducah. The Panel's misstatements could be due to an oversight in its review of the record, or to poor drafting of its report. In any event, these errors are ultimately insignificant, as they would not change either the Panel's determination or the result reached in the present appeal.

III. Conclusion

The worker has not demonstrated any error in the Panel's determinations regarding his bronchial asthma, or his chronic bronchitis. However, the worker has shown that the Panel failed to consider one of his claims, for post traumatic injury related psychiatric disability linked to his chemical pharyngitis from exposure to HF gas at the DOE facility, even though the record is replete with information about this medical condition. In addition, the worker has shown that the Panel made certain factual errors that should be corrected. Consequently, this case shall be remanded the matter to OWA for further processing. Accordingly, the appeal should be denied in part, and granted in part.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0124 be, and hereby is, denied in part, and granted in part.
- (2) The matter is hereby remanded to the Office of Worker Advocacy to consider the worker's claim that he suffered post traumatic injury related psychiatric disability linked to his chemical pharyngitis from exposure to HF gas at the DOE facility.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 25, 2004